United Services Automobile Association and **Loretta Willams.** Case 12–CA–21735

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On January 28, 2003, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

We agree with the judge, for the reasons set forth in her decision, that the Charging Party, Loretta Williams, engaged in protected concerted activity by distributing fliers anonymously throughout the Respondent's facility. We also agree with the judge, for the reasons set forth below, that the Respondent unlawfully interrogated Williams and employee Andrew Snyder regarding employees' protected concerted activity and unlawfully discharged Williams for engaging in this activity. In addition, we find, in accordance with the judge, that the Respondent promulgated unlawful no-solicitation/no-distribution rules via e-mail and voice mail.

I. FACTUAL BACKGROUND[3]

On July 31, 2001,[4] employee Loretta Williams, an insurance adjustor for the Respondent, distributed 1200 to 1300 fliers anonymously, requesting fellow employees to wear a red ribbon in support of colleagues who had been laid-off as a result of a reorganization plan implemented by the Respondent.[5] Williams placed the fliers on employees' individual desks, at the end of hallways, and in mailboxes between the hours of 8 and 11 p.m. She departed the Respondent's premises at 11 p.m.

The following morning, several of the Respondent's managers began removing the fliers from employees' desks. However, Respondent's senior vice president and general manager, General Thomas V. Draude, ordered the managers to leave the fliers in place so that employees could "grieve" the loss of laid-off employees. That same day, General Draude, in an e-mail to Respondent's managers, requested that they remind their supervisees that distributing "'non-USAA printed information' in the *workplace* violates [the] non-solicitation policy."[6] (Emphasis added.) After receiving Draude's email, Manager David Huffman copied and sent the above-mentioned portion of the e-mail to his supervisees. The following week, General Draude left a message for all employees on the Respondent's common phone voice mail system, known as the 5-NEWS line, stating that managers began to collect the fliers because the "company's non-solicitation policy says you can't distribute non-USAA material in the *building*." (Emphasis added.)

Approximately 1 week after the flier distribution, Williams' supervisor, Eileen Hale, requested that Williams accompany Hale to the Respondent's personnel office. Thereafter, Williams was introduced to Sheila Christy-Martin, director of Respondent's human resources advisory team. Christy-Martin stated at the outset of the meeting that she wanted to ask Williams questions regarding safety, overtime, and possible breach of security with regard to the distribution of the fliers. Christy-Martin told Williams that the security turnstiles had clocked Williams leaving the building on July 31 at 11 p.m. Therefore, Christy-Martin wanted to know if Williams had been working up until that time. Williams stated that she had been doing some work on her files, but was not seeking overtime for that work. Christy-Martin also asked Williams whether she had seen anything unusual in the building on the night that the fliers had been distributed. At this point, Williams admittedly became defensive and told Christy-Martin that she did not want to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997). In addition, we shall modify the recommended Order to provide that the Respondent rescind its unlawful no-solicitation/no-distribution policy and notify its employees that it has done so. We shall also issue a new notice to conform to the Order.

[3] The factual background is fully set forth in the judge's decision.

[4] Hereinafter all dates are in 2001 unless otherwise noted.

[5] Portions of Williams' flyer are set forth in Sec. II.C.I. of the judge's decision.

[6] The Respondent maintained the following no-solicitation/no-distribution rule from March 2001 to November 2001 in its employee handbook: "Advertising or distributing any non-USAA printed information including fliers, business cards, brochures, or catalogs is not permitted at any time in the work area and only during non-working hours in non-work areas."

answer any questions regarding the fliers. Christy-Martin told Williams that the distribution of the fliers was against the Company's no-solicitation/no-distribution policy. Williams stated that she had not seen anything unusual, that she felt uncomfortable with the questions, and asked whether she needed an attorney with her. Williams was then told that the security cameras had a picture of her entering the building on July 31 at 7 p.m. with a large box; Christy-Martin wanted to know what was in the box. Although Williams testified at the hearing that the fliers were in the box, she only told Christy-Martin that she had papers in the box. After an hour of questioning, Williams was sent back to her office.

At the same time that Williams was being questioned, the Respondent was also questioning employee Andrew Snyder. Snyder had been working overtime at the Respondent's facility on the night that the fliers had been distributed. Snyder was in no way involved in the flier distribution. The Respondent questioned Snyder as to whether he had seen anyone walking around the facility or if he had seen the fliers before he left for the night. The record does not reflect how Snyder responded to these questions.

A few days after her questioning, Williams decided to "confess" to General Draude that she was the one who had passed out the fliers. After Williams admitted that she distributed the fliers, General Draude accused Williams of lying at the interview with Christy-Martin, and told Williams that she was fired because of this dishonesty. Williams attempted to explain that she had not lied, but was deliberately evasive because she was afraid. Despite her explanations, General Draude terminated Williams.

In his complaint, the General Counsel alleged that the Respondent: (1) maintained an unlawful written no-solicitation/no-distribution policy; (2) promulgated unlawful no-solicitation/no-distribution policies via e-mail and voice mail; (3) unlawfully interrogated employees Loretta Williams and Andrew Snyder; and (4) unlawfully terminated Williams for engaging in protected concerted activity and for violating the Respondent's unlawful no-solicitation/no-distribution rule.

While the judge did not address complaint allegation (1), she found merit in complaint allegations (2), (3), and (4). We agree with the judge's findings of violation for the following reasons.

II. DISCUSSION

A. Respondent's Policies

1. No-Solicitation/No-Distribution Policies

The judge found, and we agree, that General Draude and Manager David Huffman's explanations of the no-solicitation/no-distribution rule were unlawful. No exceptions were filed to the judge's failure to explicitly rule on the legality of the written handbook policy, and, accordingly, that issue is not before us for consideration. However, the Board has found that a rule prohibiting solicitation or distribution during "working time" is presumptively valid and one prohibiting solicitation or distribution during "working hours" is presumptively invalid. See, e.g., *Our Way, Inc.*, 268 NLRB 394 (1983). We note that the Respondent does not contend that the written handbook policy was lawful, and in fact, in its brief to the Board, the Respondent admitted that its written rule "may have been overly broad." The judge also noted, in her decision, that the Respondent has since modified its written policy. The complaint does not challenge the legality of the Respondent's modified policy, and we therefore express no view on that issue as well.

2. Unwritten No-Access Policy

The Respondent contends that it maintained a valid unwritten policy prohibiting employees from remaining in their work area after working hours, unless authorized to do so, and, at any time, from entering work areas other than their own without a business purpose. It further argues that Williams lost the Act's protection when, in violation of this policy, she entered the building without authorization after her regular work time. We find no merit in Respondent's argument.

As found by the judge, the Respondent failed to prove the dissemination of a valid no-access policy at the time Williams distributed the fliers. That is, there is no evidence that the policy had been clearly disseminated to employees and enforced by the Respondent. On the contrary, employees were indisputably allowed access to certain nonwork areas of the building after their scheduled work hours, even for nonwork related purposes. Under these circumstances, we find that the Respondent failed to prove dissemination of a valid no-access policy or rule. Accordingly, Williams' entry into the building offices after hours to distribute fliers constituted protected activity and Respondent was not permitted to interrogate her about it. Further, and in any event, we find for the reasons stated below that Williams was not interrogated for violation of the alleged policy but rather to determine whether she distributed the fliers which the Respondent found objectionable.

B. Interrogations of Loretta Williams and Andrew Snyder

We find that the Respondent coercively interrogated employees Williams and Snyder about the employees' protected concerted activities. We find unpersuasive the Respondent's argument that it lawfully interrogated Wil-

liams and Snyder to determine whether either employee remained in the building after hours in violation of the Respondent's alleged unwritten no-access policy. We find this conclusion inescapable because, from its own security records, the Respondent already knew the employees who were in the building that evening. That the Respondent was focused on determining who was engaged in the protected activity, namely, the flier distribution, is clear from the questions that were asked each employee. Christy-Martin asked Williams what she was doing in the building until 11 p.m., whether she had seen anything unusual, and what was in the box Williams brought into the building. Similarly, Snyder was asked whether he had seen anyone walking around the facility and if he had seen the fliers in the building before he left.

The proper test for determining whether an employer's interrogation of an employee violates Section 8(a)(1) is whether, under the circumstances, the interrogation reasonably tended to restrain or interfere with the employees' exercise of the rights guaranteed them under the Act. See *Spartan Plastics*, 269 NLRB 546, 552 (1984). We find that it did. The employees would reasonably perceive that the Respondent had only one objective in questioning Williams and Snyder—to identify who had been engaged in the flier distribution. We find such questioning would reasonably tend to interfere with or deter the exercise of employees' Section 7 rights.[7] See *Spartan Plastics*, supra.

C. Termination of Loretta Williams

The Respondent contends that it did not terminate Williams for distributing the fliers, but because she lied during her "lawful" questioning by Christy-Martin. We find Respondent's position without merit.

At the hearing, Williams conceded that she was "evasive" during her questioning by Christy-Martin. She emphasized that she did not feel comfortable being honest about the contents of the box she had carried into the building and the fliers she distributed, fearing that the Respondent would retaliate against her. As a result, to protect herself, she lied.

As mentioned above, we find that Respondent's purpose for questioning Williams and Snyder was to determine who had been engaged in the flier distribution—a protected concerted activity. The questions did not serve a dual purpose, one valid, the other invalid. Therefore, we reject, as the judge did, the Respondent's stated concerns about a breach of security and overtime issues.

Given that the interrogation was unlawful, we find that Williams was under no obligation to respond to the questions in any particular manner. See *Spartan Plastics*, supra. Therefore, "it can be no defense to Respondent to recite a wrong [by Williams] in responding to an action of Respondent which itself constituted a violation of law." Id. at 552. Consequently, under these circumstances, Williams' dishonesty about her protected concerted activity did not constitute a lawful reason to discharge her.

Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by terminating employee Loretta Williams for engaging in protected concerted activity.[8]

ORDER

The Respondent, United Services Automobile Association, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an overly broad no-solicitation/no-distribution rule that prohibits employees from distributing printed and written material during nonworking time in nonworking areas.

(b) Coercively interrogating employees about their protected concerted activities.

(c) Terminating employees because they engage in protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful no-solicitation/no-distribution rule that prohibits employees from distributing printed or written material during nonworking time in nonworking areas, and notify employees that this has been done.

(b) Within 14 days from the date of this Order, offer Loretta Williams full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Loretta Williams whole for any loss of earnings and other benefits suffered by reason of the discrimination against her, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Loretta Williams, and within 3 days thereafter notify Williams in writing that this has been done and that the discharge will not be used against her in any way.

[7] In agreeing that the interrogations were unlawful, Member Walsh also adopts the rationale set forth in the judge's decision.

[8] Member Walsh also finds Williams' discharge unlawful for the reasons set forth in the judge's decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2001.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain an overly broad no-solicitation/no-distribution rule that prohibits you from distributing literature in nonworking areas during nonworking time.

WE WILL NOT coercively question you about your protected concerted activity.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the no-solicitation/no-distribution rule that prohibits you from distributing literature in nonworking areas during nonworking time, and WE WILL notify you that this has been done.

WE WILL, within 14 days from the date of the Board's Order, offer Loretta Williams full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Loretta Williams whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Loretta Williams, and WE WILL, within 3 days thereafter, notify her in writing that we have done so and that we will not use the discharge against her in any way.

UNITED SERVICES AUTOMOBILE ASSOCIATION

Rafael Aybar, Esq., for the General Counsel.
Michael D. Malfitano, Esq., and *Reid E. Meyers, Esq.,* for the Respondent.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Tampa, Florida on December 18 and 19, 2002. The original charge was filed by Loretta Williams, an individual, (Williams) on August 15, 2001,[1] and an amended charge was later filed by Williams on November 15, 2001. Based upon the charges filed, complaint issued against United Services Automobile Association (Respondent) on August 28, 2002. The complaint alleges that Respondent terminated Williams on or about August 15, 2001, because she violated Respondent's no-solicitation/no-distribution policies and because she engaged in protected concerted activities. The complaint further alleges that Respondent further interfered with employees' section 7 rights by its promulgation and maintenance of its no-solicitation/no-distribution policy from March 1, 2001, until November 16, 2001, and by its interrogating employees on August 9, 2001, about the protected concerted activities of other employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an unincorporated association under the insurance laws of the State of Texas, provides insurance and financial services to the military community at its facility in Tampa, Florida, where it annually derives gross revenues in excess of $500,000 and purchases and receives goods and materials valued in excess of $50,000 at its Tampa facility directly from points outside the State of Florida. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The General Counsel maintains that from March 1, 2001, until November 16, 2001, Respondent maintained an overly broad no-solicitation/no-distribution rule at its Tampa, Florida facility. On or about July 31, 2001, Williams personally distributed 1200 to 1300 flyers to the work area of Respondent's Tampa workforce of approximately 1597 employees. General Counsel submits that following Respondent's interrogation of Williams on August 9, 2001, Respondent terminated Williams because she engaged in protected concerted activity.

Respondent asserts that after the distribution of the flyers on July 31, 2001, it conducted an investigation to determine if there had been a security breach within the facility. When questioned, Williams denied any knowledge of the leaflet or the distribution. Williams later admitted that she had been the individual who had distributed the flyers. Respondent submits that Williams was not fired because she violated the no-solicitation/no-distribution policy, but because she had lied about her involvement.

[1] All dates are 2001 unless otherwise indicated.

B. Background

1. Respondent's no-solicitation /no-distribution policy

In November 2000, Respondent's revised employee handbook included the following language:

WORKPLACE SOLICITATION

> Your relationship with your coworkers is important to teamwork. In some cases, solicitations from coworkers can be embarrassing or create a hardship for coworkers who do not wish to participate. To avoid these situations, do not ask others to donate, buy, or sell merchandise or to participate in fund-raising activities in work areas or during work hours unless they are pre-approved by USAA.
>
> There are many opportunities to support the community through company-sponsored programs like the Season of Sharing holiday program, Junior Achievement, United Way, and other special programs approved by the CEO and coordinated through the senior officer of Community Affairs.
>
> Advertising or distributing any non-USAA printed information including fliers, business cards, brochures, or catalogs is not permitted at any time in the work area and only during nonworking hours in non-work areas.
>
> Distribution of non-USAA-business fliers is not permitted on escalators, walls, railings, doors, newsletter racks, or on bulletin board or other areas designated for corporate communication. This policy includes advertisements, solicitations, or brochures, as well as information about birthday's, retirements, or reunions.
>
> In-box fliers sent directly to an employee's interoffice mailbox in support of official USAA policies, programs, and services are the only fliers permitted for distribution through USAA resources. Contact Employee Communications if you have a business need to deliver in-box fliers to individuals outside the direct reporting units of the senior officer approving the flier.
>
> GAMBLING and the solicitation to gamble in any form (e.g. lottery pools or prizes, baseball or football pools, etc.) are not permitted. This type of activity does not reflect the professionalism expected by members, and, in some cases, may be illegal or in violation of regulatory requirements.

In November 2001, the no-solicitation/no-distribution policy was modified to clarify working time, define solicitation, and further explain restrictions on distribution of printed materials.

2. Respondent's reorganization and layoffs

During the summer of 2001, Respondent underwent a reorganization that resulted in the elimination of positions in clerical, administrative, and support positions and the layoff of approximately 20 individuals in the Tampa office. Respondent not only issued notices to employees concerning the organizational restructuring, but also held briefings to explain why the reorganization was required. In newsletters to managers dated

July 12, and July 30, 2001, Respondent's President Butch Viccellio, discussed the restructuring and the inevitable displacement of some employees. Thomas V. Draude, senior vice president and general manager for Respondent's Southeast Region testified that the content of the newsletters were communicated by the managers to the employees soon after the distribution dates. Draude denied that any employees expressed concerns to him about the company's restructuring and denied any knowledge of employees expressing concerns to any of the other managers.

C. Williams' Termination

1. Background

Loretta Williams began working for Respondent in June 1991. At the time of her discharge in 2001, Williams was classified as an auto casualty claims adjustor or generally identified as a bodily injury adjustor and supervised by Eileen Hale. While Williams had been a salaried employee, her position was converted to an hourly position at the end of 2000. Her hours were generally 8 a.m. to 6 p.m. for 4 days a week. Supervisor Hale allowed employees to have a flexible work schedule and employees generally worked varying hours between 7:30 a.m. to 6:30 p.m. Williams testified that if an employee needed additional time to complete necessary work, the employee could work overtime without specifically requesting it in advance from Hale. Hale confirmed that in some instances it would not be possible for employees to get advance authorization when they needed to work overtime. If employees needed to work additional time, they could simply log it into the timesheet at the end of their day.

Williams testified that she had a general awareness of Respondent's no-solicitation/no-distribution policy. She understood that it applied to strictly fund raising activities, requests for money, outside businesses, and generally solicitation. She recalled that even though there was a no-solicitation/no-distribution policy in place, employees routinely collected for various causes such as Secret Santa, birthday cakes, birthdays, flowers, and retirements. Employees selling Avon products left catalogs on other employees' desks. Williams also recalled that in June 2001, she and other employees gave an employee a wedding shower in Respondent's breakroom at the end of the workday. Williams recalled that approximately 50 or 60 invitations were distributed throughout the work and nonwork area. Williams left a copy of the invitation on not only Hale's desk, but also Hale's supervisor's desk. Williams received no discipline or comment from management for distributing the wedding shower invitations. The shower lasted from approximately 5:30 p.m. to 7:30 or 8 p.m. Williams obtained no additional authorization to remain in the building for the extended hours for the shower. Williams testified that employees are generally not required to obtain authorization to remain in the building after regular work hours as they have badges that allow 24-hour access to the building. Williams also testified that employees have occasion to remain in the building after their regular working hours to work out in the fitness center, use the internet, study for insurance classes, or just to eat dinner in the breakroom to avoid fighting the traffic to go home. Williams recalled that she often remained at work after her scheduled work day to not only avoid traffic, but also to read resource materials for career development, and reorganize her desk for the next day. Williams also testified that on one occasion, she had worked the entire night before leaving for a Thanksgiving vacation without obtaining prior authorization. She admitted however, that this had occurred while she was still in a salary position and not compensated as an hourly employee.

Williams testified that she understood the reason for Respondent's reorganization and layoffs earlier in 2001, however, she had not agreed with the way in which the layoffs were being handled. She believed that Respondent was selecting the oldest employees who were earning the most money. Williams testified that it was her opinion that employees vulnerable to the layoff could not voice their concerns because of the risk of losing their jobs. By contrast, Williams did not fear layoff for herself as Respondent had already confirmed that employees who were dealing directly with customers were not in line for layoff. Because of her concerns about the layoffs, Williams created a flyer urging employees to wear a red ribbon in support of laid-off employees. The flyer entitled "Wear a red Ribbon in Support of Our Lost Colleagues" included the following:

> Employees are people . . . . We have families, children, mortgage, bills. We are consumers of the products we make and sell. We are not obsolete computers that are too expensive to operate. We strongly urge you to view every employee as a valuable human resource—an asset that should be cherished, nurtured, & developed to maximize production at full potential. You have not eliminated positions—you have eliminated people—the tasks & work they performed still exist. These people were our friends, our mentors, and members of our workplace family.

The flyer went on to challenge Respondent's leaders to plan, design, organize, and implement with foresight and care for the people they direct. Williams contended:

> Layoffs are not our failures as productive employees-they are reactionary results from a lack of vision, innovation, and sound judgment on the part of our leadership.

Williams urged all employees to wear the attached red ribbon for the next couple of weeks in support of missing colleagues and any time that layoffs are pending and employees are waiting for the ax to fall. She also urged that employees send the message to corporate officers and executives and to employees in other regions and to "let the decision-makers know how we feel."

2. Williams' distribution of the flyers

On July 31, 2001, Williams distributed approximately 1200 to 1300 of the flyers throughout five floors of Respondent's facility. Flyers were left in mailboxes, on desks, and on piles at the end of the aisles. Williams recalled that while she may have distributed some of the flyers during her break after 5:30 p.m., she primarily distributed all the flyers between 8 p.m. and 11 p.m. Williams received assistance from only one other employee during the evening. Because she did not have badge access to the mailroom and security areas, she asked an em-

ployee in information technology to pass out approximately 30 or 40 flyers in those areas. Williams had not known the employees' name.

When Williams arrived at work on August 1, she discovered that District Manager Wiley Smith had begun taking the flyers from employees' desks. Williams testified:

> And so I was looking for my own and I couldn't find it, and so I knew that—well, something, just their reaction to the memos was so drastic, so overboard, that I knew I had crossed some line. I don't—you know, it was—I had done something really, really eyebrow raising.

3. Respondent's response to the flyer

In an e-mail message to managers on August 1, 2001, Draude explained that he had asked managers to leave the flyers in place. Draude further explained that if employees wanted to wear the red ribbons, that was up to the employee. Draude acknowledged: "We must recognize that there is a lot of sadness associated with the restructuring, and if this helps people deal with it, that's fine." Draude urged managers to increase face-to face time with employees and acknowledged that Respondent could not "over communicate" about the tough decisions that had been made or the challenges there were ahead. Draude also included:

> Please remind your employees that if they have a personal message, the proper vehicle for that is "Speak Up" which they can access on the Intranet. Remember that distributing 'non-USAA printed information' in the workplace violates our non-solicitation policy, which is why managers picked up some of the fliers.

Approximately an hour after receiving Draude's e-mail message, claims subrogation manager, David Huffman, sent an e-mail message to the employees in his department, setting out the substance of Draude's earlier message. Huffman included the reminder that distributing "non-USAA printed information" in the workplace violates the no-solicitation policy.

During the week of August 6, 2001, Draude addressed the flyer during his recorded phone message to employees. Draude explained that the message of the flyer had less to do with supporting former employees and more to do with chastising management for hiring too many people in the first place. He maintained however, that the reason for the managers having picked up the flyers had been based upon the company's no-solicitation policy. Draude stated: "They picked up the flier because the company's no-solicitation policy says you can't distribute non-USAA material in the building."

During the week following the distribution of the flyers, Respondent began an investigation to determine who was responsible for the distribution of the flyers. Security and facility access records revealed that Loretta Williams and Andrew Snyder were the only two employees who appeared to be working as late as 11 p.m. on July 31. Supervisor Don Pisoni and executive director of human resources met with Andrew Snyder prior to 8:30 a.m.[2] on August 9. Respondent's notes from the meeting reflect that Snyder was questioned about whether he had seen anyone walking around on July 31 or if he had seen anything unusual. He was also asked what he was working on that evening, whether he had made any telephone calls, whether he had seen the security guard, and if he had seen the fliers when he left the building that evening. Respondent also determined that Snyder had prior authorization to work overtime that evening. A security photograph for July 31 showed Williams entering the building with a large box around 7:26 p.m. Based upon the circumstances known to Respondent, Draude confirmed that Williams was the logical person to have distributed the flyers.

4. Respondent's alleged interrogation of Williams

Williams testified that for the next 10 days after she distributed the flyers, things seemed to settle down and employees were not talking about the flyers as much as before. On August 9, Supervisor Hale asked Williams to come with her to personnel. Williams contends that she asked Hale if she needed to bring anything or if she was in trouble. Williams also asked if she was going to be fired. Hale assured her that she was not and that "they" just wanted to talk with her. Williams accompanied Hale to personnel where she met with Hale and Sheila Christy-Martin, director for the human resources advisory team. Christy-Martin's notes of the meeting reflect that she told Williams that Respondent had knowledge that Williams worked until 11 p.m. on July 31. Christy-Martin explained that the company was concerned about her having done so for three reasons; safety, working with or without approval from her manager for overtime, and because of the flyers that were distributed and whether she had seen anything.[3] During the course of the meeting, Christy-Martin asked her specifically what she had been working on that evening and if she had made any telephone calls or spoken to anyone. Williams explained that she had been there with implicit permission because she was making up time that she had missed earlier in the week because of an emergency dental appointment. She contended that she had earlier arranged with Hale to make up the lost time. Williams denied that she had seen anything out of the ordinary and contended that she had been working on diaries, mail, and her files. Williams contended that Hale and Christy-Martin continued to try to pin her down on the hours that she had worked on July 31. Williams asserted that she told them that she couldn't say with certainty because she didn't have any documentation in front of her. Williams testified that she continued to ask if it was necessary for her to have an attorney present and she was assured that she did not need an attorney. Christy-Martin also testified that when Williams had asked for an attorney during the meeting, Christy-Martin had told her that she did not need one. Williams recalled that she told them:

> You are obviously trying to find out who passed out those flyers, and I have no trouble with the message in those flyers, with them being passed out, you know, and I really, really don't feel that these questions are valid.

[2] Respondent's record of the meeting shows that it was written at 8:36 a.m. on August 9, 2001.

[3] Respondent's notes from the Williams and Snyder meetings reflect that this same introduction was used in both meetings.

Christy-Martin's notes reflect that Williams denied having seen the flyers when she left the building. Christy-Martin's notes also included the following:

> She stated she does not feel comfortable answering these questions. She feels like she will [be] retaliated against if she saw someone, and it could have been more than one person distributing the fliers or it could be a committee of people. I reminded her our concern is if it is her, if she helped someone or saw who did pass them out in the work area, the employee needs to follow policies and procedures. I advised her we are not focusing on the content but violation of the solicitation policy—distributing this information in the work area. I reminded her of the appropriate channels?? Speak Up if someone wanted to submit their concern anonymously, they can do so.

Williams contends that she told them that she was not going to answer any questions without an attorney present and that she continued to refuse to answer their questions. Christy-Martin told her that if she were in the building working until 11 p.m., she needed to be paid for that time. Williams testified that she told Hale and Christy-Martin that she wasn't working on USAA matters and that she was not claiming overtime for hours worked that evening. Christy-Martin told Williams that Respondent had a security photo of her carrying a large box into the building. Williams initially responded by saying "A lot of people were taking boxes in and out of this building in the last few weeks." Williams then admitted to Christy-Martin that she had brought a box into the building, but contended that it contained work papers. Williams recalled that the meeting ended with Hale's suggesting to Williams that she think about and document the hours that she worked on July 31. Williams testified that she continued to insist that she was not owed any additional compensation for her work on July 31. Williams testified that she at no time ever claimed that she was working during the time that she was passing out the flyers.

Christy-Martin admitted that at no time did she ever directly ask Williams if she had distributed the flyers. Christy-Martin recalled only that she had told Williams that the flyers had been distributed and Respondent was trying to determine if she had seen the flyers or anyone in the area while she was working that evening. Draude further admitted that based upon Christy-Martin's notes, Williams never specifically denied that she had been the one to distribute the flyers.

5. Events prior to Williams' discharge

The day following her meeting with Christy-Martin and Hale, Williams called in sick and the following Monday was her scheduled day off. She consulted an attorney who advised her to take her flyer to the National Labor Relations Board, which she did. She was advised that she could file a charge with the agency and the matter would be investigated if she were disciplined or terminated in relation to the flyer. After talking with her attorney again, she decided that she needed to tell Respondent that she had been the one responsible for the flyer. She contacted Draude's secretary on August 14 and requested an appointment to speak with Draude. Williams admitted to his secretary that she was responsible for distributing the flyers and that they could "stop the witch hunt." Later that same day, Williams called Hale and admitted that she was responsible for distributing the flyers and confirmed that she had an appointment with Draude on August 15th.

Williams testified that when she went in to talk with Draude on the 15th, she was feeling "pretty good" about the fact that he cared enough to meet with her. She believed that Draude was meeting with her because he wanted to hear about how the employees felt and what had been the impetus behind the flyer. Williams recalled that she told him that she had been concerned about the way in which employees had been selected for layoff. She told him that no one had been speaking for the employees and they were without a voice and without empowerment. She further explained that she had initially wanted to be anonymous in the distribution of the flyers because of what she termed the "Santa Claus" effect. She explained that she had wanted employees to feel that somebody was looking out for them and that it was more than just her.[4] She testified that if she had come forward and let the employees know that she had written the flyer, it would be like finding out that Santa doesn't exist and it is really one's mother putting the presents underneath the tree.

Draude then explained to Williams that the bottom line was the fact that she had lied. He went on to explain that she told investigators that she was working when she had really been passing out the flyers and that they could not have liars working for USAA. Draude told her that she was fired. Draude's meeting notes indicate that Williams admitted that she had been purposely vague and had failed to answer questions during her meeting with Christy-Martin, but she had denied that she had lied. When Williams left Draude's office, Respondent's director of personnel was waiting for her with her termination paperwork.

6. Respondent's evidence on Williams' termination

Draude testified that the sole reason for Williams' discharge was the fact that she lied during the investigation of the distribution of the flyers on August 9, 20001.

Draude admitted that he had viewed the distribution of the flyer as disruptive as the flyer was a nonbusiness related, non-USAA document that had been placed on desks and in the work area. Draude directed an investigation to determine who was responsible because he wanted to know who was in the building at an unauthorized time. When asked why he had wanted to know who distributed the flyers, Draude responded:

> I was concerned about the safety and security, first of all, of the workplace, and the possibility that an employee who was in there without permission, or without the knowledge of others, could, in fact, become a casualty, become sick, become incapacitated and without our knowledge. So the main concern was the security of the building, which we certainly don't want trespassers or anyone else to be there because of the nature of our business, and also along with it, the safety of our employees. Obviously, someone had been in the building

[4] Draude's notes from the meeting reflect that Williams had spoken of wanting to be Santa Claus in distributing the flyers.

without our knowledge, and the indication of that was the presence of the flyers.

Draude asserted that the flyers had triggered the realization on the part of the company that someone had been in the building that should not have been. He contended that the investigation had been prompted because of their concern for the security of the building, the safety of the employees, and well as a concern that the company may not have been honoring the overtime requirement. He explained that if an employee was working overtime and had the permission of the manager, the company would have been required to pay overtime. He explained: "So there is that part of it also to ensure that we were doing right for the employees."

Draude testified that he first learned that Williams had distributed the flyers when she contacted his secretary for an appointment. He contacted human resources and the corporate headquarters in San Antonio. He testified that at that point, he had decided that if she admitted to him that she had lied, he would terminate her.

Draude recalls that when he confronted Williams in their meeting on August 15, Williams repeatedly denied that she had lied during the investigation. Draude pointed out that during her interview with Christy-Martin, she had denied knowing anything about the flyers and she had lied about the contents of the box. Draude told Williams that she had the opportunity to tell the truth and she had chosen not to. He recalled telling Williams: "To me that constitutes lying."

III. FACTUAL AND LEGAL CONCLUSIONS

A. Whether Williams' Conduct was Protected

General Counsel alleges that Williams was terminated because she engaged in protected concerted activity. In *Meyers Industries*, 268 NLRB 493 (1984), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *Meyers Industries*, 281 NLRB 882 (1986), the Board determined that for an employee's activity to be concerted within the meaning of Section 7 of the Act, the activity must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself. Once it has been determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the activity, the concerted activity is protected under the Act, and the adverse employment action was motivated by the employee's protected concerted activity.

In *Meyers II*, the Board emphasized that its definition of concerted activity included individual activity where "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887 (1986). The Board explained that the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity. Thus, it appears that an employee, acting on behalf of fellow employees to address a concern with management fits clearly within the parameters of *Meyers II*. In the instant case, Williams was acting solely for the benefit of her fellow employees. She had been assured by management that as an employee who deals directly with the client, she was not targeted for layoff. Despite the fact that this was not her cause, she nevertheless took it upon herself to address what she viewed as management's mishandling of the layoffs and voice what she felt to be the concerns of other employees. Clearly, in her attempt to be the spokesperson for those who were affected by the reorganization, she engaged in concerted activity.

Respondent contends that even if Williams was engaged in concerted activity, it was not protected. Respondent cites a recent Board decision as a basis for finding that an employer's restrictions or prohibition of access may be justified. *Nynex Corp.*, 338 NLRB No. 78 (2002). Respondent urges that the Board's decision in Nynex supports the premise that employees do not have an unfettered right to engage in concerted activity at any location they choose. Respondent contends that Williams did not have authorization to go into other work areas to distribute the flyers and thus was not protected in this concerted activity. I find the circumstances of *Nynex* however, distinguishable from those of the present case. In *Nynex*, the employer maintained an Absence Benefit Center staffed by licensed nurses to process and evaluate employee absences. Although the union represented the employees whose absences were processed, it did not represent any employees who actually worked in the center. Dissatisfied with grievance processing concerning its represented employees, the union executive board entered the center, unannounced, and demanded to schedule appointments to discuss grievances. There was no evidence that anyone in the center played any role in the processing of grievances under the parties' collective bargaining agreement. The Board found that the manner in which the union employees and representatives acted was unprotected and the employer's suspension of these employees was a lawful reaction to this conduct. In finding this conduct to be unprotected, the Board considered the fact that the individuals caused a 2-hour disruption of work and persistently refused the employer's demands to leave. The Board noted "These union representatives entered the working area of the Center during the nurses' working time, loudly confronted nurse case managers at their cubicles, refused to meet with McDonnell-Foley in a conference room in a public area, and wandered the work area of the Center recording the nurses' names and cubicle locations." The Board thus found that based upon the totality of the circumstances, and with particular emphasis on the disruption of the nurses' work and the representatives' refusal to leave at the employer's repeated requests, the employer did not violate 8(a)(1) by calling the police, suspending the employees, and suing the Union for trespass. I do not find Williams' conduct comparable to the unprotected conduct in issue in *Nyntex*.

Respondent further contends that its prohibition against off-duty employees entering work areas complies with the Board's standard for determining whether a company's restrictions on access to work areas are proper. Respondent maintains that if an employer has only limited access to the interior working areas of a facility, has clearly disseminated this policy to employees, and the policy applies to all off-duty employees, and not just those engaged in union or other concerted activity, the employer may lawfully prohibit off-duty employees from ente-

ing its working areas.[5] Respondent asserts that it has met these guidelines and thus lawfully restricted Williams' access to the other working areas of the facility. I do not find that the record supports this finding. Hale testified that people were expected to leave their work area when their shift was finished and that employees were not authorized to be in other people's work areas or to "wander the building into other employees' work areas late into the evening." Christy-Martin testified that if Williams did not have a business need, she was not supposed to have access to the work areas of the other floors. Despite such assertions however, Respondent concedes that it has no written rule setting forth those restrictions. In its brief, Respondent urges that even though it was not written, supervisors met with and notified employees about their access to the facilities. When Hale was asked on direct examination if it was well known to employees that they were not permitted to wander the building into other employees' work area late into the evening, she simply answered that they were. She gave no additional information as to how or when this restriction had been disseminated to employees. By contrast, when asked if Williams knew to record her overtime in the timesheet book before leaving the office, Hale explained that she did because she had explained this to Williams upon her entering the unit. Although Respondent maintains that employees knew that they were restricted from other employees' work areas, no Respondent witness provided any specifics of how or when this restriction had been disseminated to employees. By contrast, Williams testified extensively about having distributed wedding shower invitations to employees in other work areas and even providing an invitation to Hale and Hale's supervisor at their desk. Hale did not dispute Williams' having done so. She testified only that she did not remember seeing the invitation. Both Williams and employee Valerie Toloday testified that there was a practice of employees selling candy for fundraisers and selling Avon products from their work desk. Toloday confirmed that on occasion employees went to other desks and left nonwork related items and that employees made no attempt to hide the fact that they were doing so. Based upon their total record testimony, I found Williams and Toloday to be more credible witnesses. Toloday was especially believable as she testified that not only was her husband hospitalized, but pursuant to subpoena, she had been called away from her job and required to attend the hearing. Accordingly, I do not find that prior to Williams' distribution of the flyers that there was a valid restriction for employees to other work areas or that such restriction had been clearly disseminated to employees.

Respondent also argues that there were restrictions on access to work areas because of the sensitive information contained on every adjustor's desk. It is undisputed that adjustors worked with confidential medical records and other sensitive personal information. Respondent contends that Williams' actions were unreasonable and unprotected because she went to every desk in the building to leave the flyers. Williams testified, without dispute, that her work area was located in the midst of approximately 24 other nonsupervisory employees.[6] There is no evidence that employees worked in locked areas or in cubicles that prevented access to any other employee. Williams' access to the other floors of the building was no different than her access to other adjustors' desks containing confidential files and materials that were in her immediate work area. I don't find her distribution of flyers on July 31 to be any different than her previous distribution of wedding shower invitations or other employees' distribution of merchandise catalogs.

Relying upon *Peck, Inc.*, 226 NLRB 1174, 1175 (1976), Respondent further asserts that the Board has held that an employee who remains in the building after he or she is scheduled to leave may be engaged in unprotected activity. In Peck, Inc., however, the Board found that employees who staged a sit-in as a punishment against their supervisor for imposing upon them valid conditions which they disliked and which they wanted modified was not protected activity. The employer was found to have a clear immediate interest in attempting to secure its property, which did not unduly interfere with or restrict the statutory rights of these employees who were refusing to leave the premises. I find that case factually distinguishable from the circumstances of the present case. Based upon the total record evidence, I do not find that Williams lost the protection of the Act in her distribution of the flyers.

B. Respondent's Unlawful Interrogation

Respondent takes the position that Williams was not terminated because she distributed the flyers on July 31, 2001, but because she lied during her meeting with Christy-Martin and Hale. General Counsel alleges that this meeting was unlawful interrogation, and thus, the derivative discharge is also violative of the Act. In analyzing whether interrogation of employees concerning protected concerted activity violates Section 8(a)(1) of the Act, the Board has considered the totality of the circumstances. See *Rossmore House*, 269 NLRB 1176 (1984). In *Medcare Associates, Inc.*, 330 NLRB 935 (2000), the Board held that consideration is to be given to "the Bourne factors" in determining the lawfulness of alleged interrogations under *Rossmore House*. The Bourne factors, which were first set out by the Board in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), include the following:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

In this case, the questioners were Williams' immediate supervisor and the director for the human resources advisory

[5] Respondent relies upon *Nashville Plastics*, 313 NLRB 462, 463 (1993), citing *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976).

[6] Williams provided a written diagram of where her desk was located in relation to the other employees working in her department at the time of her discharge.

team. Admittedly, Christy-Martin gave no assurances that no action would be taken against Williams if she refused to answer or that she did not have to answer any of the questions. Christy-Martin continued to ask questions even though Williams voiced her concern that she might need an attorney present. Williams testified that she had never met Christy-Martin prior to that meeting and was unfamiliar with the office where the meeting was held. In *Bourne*, the Court noted that the employee's responses during the interrogation were truthful and ultimately concluded that there was no evidence that the interrogation in issue actually inspired fear. In this case, it is undisputed that Williams was not forthcoming in her responses and was admittedly evasive. Christy-Martin's own notes reflect that Williams told her that she didn't agree with being questioned and that she felt that she needed her attorney present. Based upon the total circumstances of the interrogation. I find that Respondent unlawfully interrogated Williams on August 9, 2001, in violation of Section 8(a)(1) of the Act. I also find that based upon Respondent's notes of the meeting held with Snyder, Respondent's interrogation of Snyder was also violative of the Act. Snyder was told that the meeting was based in part upon the distribution of the flyers and Respondent's desire to know if he had seen anything. He was questioned about whether he had talked with anyone or made any phone calls during the evening. He was also questioned about whether he had seen anyone walking around or if he had seen the flyers before he left. While Snyder had no involvement in the distribution of the flyers, his questioning about the flyers was nonetheless coercive and unlawful.

In a recent case, an employee was terminated after appearing and testifying in a Board hearing. See *Alamo Rent-a-Car*, 336 NLRB 1155 (2001). The employer contended that while the employee testified at the hearing in detail about the occurrences of the alleged unfair labor practice, he had previously denied any knowledge of the events giving rise to the charges in a sworn declaration sought by the employer. Knowing that he was being untruthful, the employee had nevertheless signed a sworn statement that he did not know anything about the complaint allegations. The employer contended that it terminated the employee because of his having lied during its investigation of the matter. The Board found that the circumstances in which the earlier statement had been given were inherently coercive. The Board noted that in this context, the employee's reluctance to volunteer information to the employer was completely understandable. The Board further explained:

> While we obviously do not condone employee dishonesty, we find here that Elvena's disclaimer of knowledge, recorded in an employer-solicited declaration in conjunction with these unfair labor practice proceedings, was given out of reasonable fear for his job security.

In Williams' written description of the August 9 meeting, she documented that Christy-Martin asked if she had seen anyone passing out the flyers. Christy-Martin's own notes reflect that she asked Williams if she had talked to anyone that evening and whether she had seen anyone walking around. In the Board's 1989 decision in *Alpha School Bus Co.*,[7] the employer's general manager interrogated an employee driver as to whether she had passed out any literature or papers during the course of her duties. The Board affirmed the administrative law judge, finding that even though the employee was an open and active union supporter, the interrogation was coercive under the *Rossmore House* standards. The manager's questions required her to identify other employees who may have shared her prounion sentiments and the employee was threatened with termination if she lied. Both the interrogation and the later suspension was found to be violative of the Act. In this case, such interrogation about other employees who may have been involved in the distribution of the flyers would be even more coercive when the employee had not openly and admittedly declared herself to be responsible for the concerted action.

Respondent contends that an employer is permitted to question an employee who has engaged in unprotected activity without violating the employee's rights, citing *HCA/Portsmouth Regional Hospital*, 316 NLRB 919 (1995). In *HCA/Portsmouth*, however, the employer lawfully interrogated an employee about having maliciously and recklessly spread false and professionally damaging rumors about a supervisor. Despite Respondent's contention that it could not tolerate the continued employment of an employee who lied, I find that Williams' conduct did not lose the protection of the Act because she was evasive and less than candid when questioned about her involvement in distributing the flyers.

Respondent contends that interrogations into an employee's job performance or the company's business purposes[8] is permitted. Respondent asserts that at the beginning of the interrogation, Christy-Martin told Williams that she wanted to speak with her because it concerned safety, unauthorized overtime, and a potential breach of the facility's security. Respondent further argues that the questions posed to Williams concerned her overtime work and a potential entitlement to additional compensation. Additionally, Respondent argues that the questions were asked to evaluate a potential security breach. Despite Respondent's attempt to categorize the interrogation as an inquiry into safety or an overtime compensation obligation, the interrogation was initiated because of the distribution of the flyers and the protected concerted activity. Christy-Martin's questions were elicited to find out who was distributing the flyers and how Williams was spending her time in the building during the time when the flyers were distributed. Draude admitted that Williams was the prime suspect as the distributor of the flyers. Her untruth did not relate to the performance of her job or Respondent's business, but to a protected right guaranteed by the Act, which she was not obligated to disclose. See *St. Louis Car Co.*, 108 NLRB 1523, 1525–1526 (1954). The fact that Williams admits that she was evasive during the interrogation makes the questioning no less coercive. The coercive nature of the interrogation is made even more apparent by the fact that Williams was fearful of fully acknowledging her protected activity to Christy-Martin. Clearly, Respondent's inter-

[7] 293 NLRB 284 (1989).

[8] Respondent cites an administrative law judge's decision and the Board's decision in *Meyers Waste System, Inc.*, 322 NLRB 244 (1996).

rogation of Williams was unlawful and the Board has found that a discharge cannot be lawful when it is based on an employee's failure to fully respond to an unlawful interrogation. See *Hertz Corp.*, 316 NLRB 672, 692 (1995).

C. Williams' Discharge for Engaging in Protected Concerted Activity

Section 8(a)(1) of the Act specifically prohibits an employee's discharge because of their protected concerted activity. Even if Respondent did not engage in the unlawful interrogation of Williams, General Counsel would nevertheless maintain that Williams was terminated because of her protected concerted activity in distributing the flyers on July 31, 2001. Respondent however, contends that the distribution of the handbills was not a basis for Williams' discharge. In order to establish that Williams was discriminated against because of her protected concerted activity, the General Counsel must show that she engaged in concerted activity; Respondent knew that she engaged in concerted activity, the concerted activity was protected by the Act, and the discharge was motivated by her protected concerted activity. *Meyers II*, 281 NLRB 882 (1986); *Meyers I*, 268 NLRB 493, (1984). Although Respondent contends that the actual distribution of the flyers had nothing to do with the decision to fire Williams, I do not find such contention supported by the record evidence.

Respondent asserted that Williams was questioned on August 9, because of its concern that there may have been a security breach in the building and a concern that Williams may have worked without receiving the appropriate overtime pay. Draude went into great detail in his testimony to explain how Respondent had a duty to protect the confidentiality of its members (customers). Certainly, this would be a logical concern for any employer who maintains confidential medical and other personal records for its customers. The logic of this argument however, is undermined by the fact that only two individuals were shown to have been in the building for extended hours on July 31 and both of them were employees. It is undisputed that Respondent's facility is gated with 24-hour security. Employees have ID badges that must be used to enter and exit the building at all times. Any visitors to Respondent's facility must show photo identification at the gate and sign in upon entering the building. There was no evidence presented that there was ever any real suspicion that someone had broken in from the outside or had in any way tampered with or obtained access to confidential files. Certainly, the very content of the flyer demonstrated that the responsible individual was an employee. The language of the flyer boldly states "As employees of an 'employment-at-will' company (especially in 'Right to Work' states), we understand we have no labor rights that legally protect us from the consequences of poor corporate decision-making." At a later point in the flyer, Williams states "As members of the USAA workforce, we challenge our leaders to look beyond the textbook cliches of labor cost formulas and organizational downsizing."

Respondent's alleged additional concern about its duty to pay Williams appropriate overtime is equally lacking in credibility. There is no evidence that Williams claimed overtime for the time that she distributed the flyers. Christy-Martin's notes reflect that when the issue of overtime was raised with Williams, she stated that she did not want to be paid overtime and she felt that she had been adequately compensated. While the Federal Labor Standards Act may require an employee to compensate an employee for overtime, there is no expectation that an employer is required to interrogate and force an employee to claim overtime when the employee resists doing so. Respondent's assertion that it was merely trying to make sure that Williams was adequately compensated for overtime work simply belies the credibility of Respondent's asserted basis for Williams' termination.

I do not find Draude credible in his testimony that concerns about security and overtime prompted the investigation and questioning of Williams on August 9. As discussed above, Draude's rationale for Respondent's questioning Williams is simply not believable. It is more reasonable that Respondent simply wanted to find out the identity of the employee who had prepared and distributed the flyer. Christy-Martin admitted that she had told Williams in the interview that Respondent wanted to know who had distributed the flyers because Respondent felt that the distribution of the flyers violated the no-solicitation policy. In her testimony at trial, Williams was not always responsive to questions asked by either General Counsel or Respondent. Although she repeatedly responded in both direct and cross-examination with unrequested information and opinion rather than fact, she nevertheless appeared as a credible witness. Even during the course of the trial, she continued to assert the rights of employees and wage her campaign to demonstrate the inequity of Respondent's treatment of its employees. Interestingly, it was in discussing what had happened to other employees rather than her own discharge, that she became tearful and demonstrably emotional. Based upon the overall testimony of Draude, Christy-Martin, and Williams, I find Williams to be the more credible witness. The evidence supports a finding that Respondent's termination of Williams was motivated by her protected concerted activity in distributing the flyer and because she violated Respondent's no-solicitation/no-distribution policy.

The Board has long held that an employer may lawfully prohibit employees from distributing literature in work areas in order to prevent the hazard to production that can be created by littering the premises. *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962). In a later case, the Board considered whether the distribution is pertinent to a matter encompassed by Section 7 of the Act in evaluating an employer's restraint of employee efforts to distribute literature on the employer's premises. *McDonnell Douglas Corp.*, 210 NLRB 280 (1974). In the instant case, Respondent's printed solicitation policy that was in effect on July 31, 2001, prohibited the distribution of non-USAA printed information at any time in the work area and only during nonworking hours in nonwork areas. Draude's e-mail to managers and Manager Huffman's e-mail to employees on August 1, 2001, stated that employees must be reminded that distributing "non-USAA printed information" in the workplace violates the no-solicitation policy. In Draude's telephone message to employees during the week of August 6, 2001, Draude explained that Respondent's no-solicitation policy prohibits distribution of non-USAA material in the building. Thus

by Draude's explanation, Respondent's no-solicitation/no-distribution rule at the time of Williams' protected concerted activity prohibited distribution in both work and nonwork areas and during nonworking time. The Board has previously determined that such an overly broad no distribution policy, prohibiting distribution in nonwork areas is violative of the Act. See *United Parcel Service, Inc*., 331 NLRB 338 (2000). See also *TeleTech Holdings, Inc*., 333 NLRB 402 (2001), where the Board reiterated that "a rule prohibiting distribution of literature on employees' own time and in nonworking areas is presumptively invalid." In analyzing disciplinary action taken pursuant to an unlawful no-distribution rule, the Board has viewed the circumstances as analogous to the "fruit-of-the poisonous tree" metaphor often used in criminal law. See *Opryland Hotel*, 323 NLRB 723, 728 (1997), citing *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 931 fn. 9 (5th Cir. 1993). Accordingly, inasmuch as Respondent's existing no-solicitation/no-distribution policy was unlawful, Williams' discharge for having violated that policy would likewise also violate the Act. *Elston Electronics Corp*., 292 NLRB 510, 511 (1989).

Respondent denies however, that Williams' discharge was based on her protected concerted activity or upon her violation of the unlawful no-solicitation/no-distribution policy. Respondent asserts that the discharge was based solely upon her lying during the August 9 interview and that its discharge of Williams is consistent with having discharged other employees for lying. General Counsel submits that since Williams was discharged for an alleged act of misconduct in the course of engaging in protected concerted activities and she was not in fact guilty of that misconduct, it necessarily follows that her discharge violated Section 8(a)(1) of the Act and Respondent's motivation plays no part in the decision.[9] General Counsel cites the Board's decision in *Earle Industries*, 315 NLRB 310, 315 fn. 19 (1994), where the Board found it unnecessary to analyze a case under the Board's Wright Line framework, which is applied in "mixed motive" cases where a legitimate, nondiscriminatory reason for adverse employment action has been advanced. The analysis was unnecessary because the only reason advanced by the employer for the employee's discharge involved activities which were found to be protected concerted activities under the Act. I find merit in General Counsel's argument. Admittedly, Williams was evasive and did not disclose to Christy-Martin that part of her time in the building on July 31 was spent in distributing the flyers. Respondent contends in its brief that Williams' evasiveness and attempts to deceive Christy-Martin during the interview "qualifies as lying." It is apparent however; that Williams' failure to disclose and her less than truthful responses to Respondent were intricately linked with her concerted activity and thus cannot be viewed as anything other than a part of her protected concerted activity. Thus, inasmuch as she was discharged for conduct which constituted protected concerted activity, a determination of Respondent's motivation and a Wright Line analysis would not be applicable. See *Saia Motor Freight Line, Inc*., 333 NLRB 784 (2001), *Felix Industries*, 331 NLRB 144, 146 (2000), enfd. 151 F.3d 1050 (D.C. Cir. 2001).

I have in the alternative however, also considered the total record to determine if Respondent has met its burden under the Wright Line analysis. Under the *Wright Line* analysis,[10] the General Counsel must establish a prima facie case sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Assuming that General Counsel is able to establish such a prima facie case, the burden then shifts to the employer to show that the same action would have taken place even in the absence of the protected conduct. Having found that General Counsel has met its burden, Respondent bears the burden of showing that it would have terminated Williams in the absence of her protected conduct. *Wright Line, Inc*., supra at 1098, *Manno Electric, Inc*., 321 NLRB 278, 279–280 fn. 12 (1996). *KNTV, Inc*., 319 NLRB 447, 452 (1995). Respondent cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. See *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990).

In its brief, Respondent argues that it has previously discharged employees for lying, misrepresenting, or obstructing an investigation. Respondent cites the previous discharge of four employees who falsified or misrepresented pay or attendance records. Respondent further cites the discharge of an individual who was involved in multiple incidents of petty theft. Respondent also references the discharge of employee Bruce Bain, who Respondent contends was discharged for lying to Draude regarding his missing a meeting with some senior officials in San Antonio. As a rebuttal witness for General Counsel, Bain not only denied that he lied to Draude, but he also denied that that he was ever told that his forced resignation was based upon lying to Draude. Bain testified that prior to his resignation, he had been placed on administrative leave following a series of irreconcilable differences between himself and Respondent. Bain testified that there had been a 1985 incident involving his wife and misconduct by a manager in the company. A lawsuit was filed later by another employee involving this same manager. Bain contended that following his having given a statement in the later lawsuit, he became the target of harassment and retaliation.

While Respondent may have previously terminated employees for falsification of time and attendance records or for petty theft, I do not find these incidents comparable to the instant case. Respondent admits that Williams was never specifically asked if she had distributed the flyers. Williams' failure to volunteer her involvement during an unlawful interrogation is not comparable to the dishonesty involved in the discharges cited by Respondent. Additionally, while Bain was admittedly very angry toward Respondent for what he perceived to be past harassment and retaliation, I find his testimony to be credible

[9] General Counsel cites *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), where the Supreme Court held that the Act is violated where "it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis for the discharge was an alleged act of misconduct in the course of that activity, and the employee was not in fact guilty of that misconduct."

[10] *Wright Line Inc*., 251 NLRB 1083 (1980).

with respect to whether he lied to Draude. Based upon the total evidence presented, the termination of Bain appears to have involved more than simply whether he lied to Draude about leaving a meeting early. Accordingly, I do not find that Respondent has met its burden in demonstrating that Williams would have been terminated even in the absence of her protected concerted activity. The asserted basis for her discharge appears to distinctly lack value and appears to be pretextual.

Accordingly, I find that the total record demonstrates that Loretta Williams was terminated on or about August 15, 2001, because of her protected concerted activity and because of violating the invalid no-solicitation/no-distribution policy and such termination is violative of 8(a)(1) of the Act. Additionally, I find Respondent's interrogation of Williams and Snyder on August 9, 2001, to be further violative of the Act as well as the maintenance of the overly broad no distribution policy that existed at the time of Williams' discharge.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) Maintaining and giving effect to an overly broad no-solicitation/no-distribution rule that prohibits employees from distributing written or printed literature in nonworking areas during nonworking time.

(b) Interrogating employees about their protected concerted activity.

(c) Terminating employees for their protected concerted activity.

3. The aforesaid unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Loretta Williams, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The remedy should also include a cease-and-desist order, and the posting of an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, United Services Automobile Association, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an overly broad no-solicitation/no-distribution rule that prohibits employees from distributing printed or written material during nonworking time in nonworking areas.

(b) Interrogating employees about their protected concerted activities.

(c) Terminating employees because of their having engaged in protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Loretta Williams full and immediate reinstatement to her former or substantially equivalent position, without prejudice to her seniority or to other rights previously enjoyed, and make her whole for any loss of pay or benefits that she may have suffered by reason of the unlawful practices found, in the manner described in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Loretta Williams, and within 3 days thereafter notify Williams in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Tampa, Florida copies of the attached notice marked "Appendix.[12]" Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all current employees and former employees employed by the Respondent at any time since March 1, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

Dated, Washington, D.C. January 28, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT coercively question you about your protected concerted activity.

WE WILL NOT promulgate or maintain an overly broad no-solicitation/ no-distribution rule that prohibits you from distributing literature in nonworking areas during nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Loretta Williams full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other right or privilege previously enjoyed.

WE WILL make Loretta Williams whole for any loss of earnings and other benefits, resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Loretta Williams, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

UNITED SERVICES AUTOMOBILE ASSOCIATION